No. 2630

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY (a corporation),

Appellant,

vs.

GLOBE NAVIGATION COMPANY (a corporation) and S. P. WESTON, as trustee in bankruptcy of the GLOBE NAVIGATION COMPANY (a corporation), bankrupt,

Appellees.

REPLY BRIEF FOR APPELLANT.

EDWARD J. McCUTCHEN,
IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Appellant.

Filed this.....day of December, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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REPLY BRIEF FOR APPELLANT.

Appellant and appellees are agreed that before the "Nottingham" set sail her captain received from her charterer a certain sum of money. They agree also, presumably, that the payment thereof represented either an advance of cash by way of a loan, evidenced by the captain's draft, or an advance or prepayment of freight under the charter party.

The voyage was frustrated and the "Nottingham" never delivered her cargo.

The court below held that we mistook our remedy in suing upon the captain's draft, and, on that ground, decided the case adversely to us, stating, however, in substance, that the decree would have been in our favor had we asked expressly for the recovery of prepaid freight. Appellees also contend that we predicated our libel upon the wrong theory but (in disagreement with the court) deny our right, even had we sued expressly therefor, to the return of prepaid freight.

Reserving for later discussion our claim upon the captain's draft, this brief is first addressed to the question of our right to recovery of prepaid freight, assuming, for present purposes, that our libel had been focused directly upon that contention.

I.

THE RIGHT OF APPELLANT TO RECOVER AS FOR PREPAID FREIGHT, PROVIDED THE LIBEL BE DULY PREDICATED UPON THAT THEORY.

On this point, appellees and the lower court are, as heretofore intimated, in disagreement: the court holding that we would, and appellees that we would not, be entitled to such recovery. We submit, of course, that the correct conclusion is that of the court.

To begin with, we frankly admit that appellant (the insurer of the advance) is entitled to recover as for prepaid freight only if the assured, itself, that is to say, the charterer of the ship, could have recovered therefor. We do not for a moment dispute the well-

settled rule that the insurer can take nothing by subrogation but the rights of the assured, and that if the assured has no right of action, none passes to the insurer. Appellees on pages 20 to 25 of their brief are simply tilting a wind mill with their elaborate array of authorities on this point. The trial judge has no need of their conclusion that there must be some misprint in his opinion with reference to the case of *St. Louis Railroad v. Conner Insurance Co.,* 139 U. S. 223, for the actual words of the trial judge's opinion are:

> "Under the law controlling in this case, *the insured* could have maintained an action against the respondent to recover the advance made." (Italics ours.)

In other words, the conclusion of the judge that libelant might have recovered for prepaid freight is upon the assumption that the assured could have so recovered.

Was the trial judge right in his view that the charterer might have recovered prepaid freight? Appellees' contrary contention is embodied in Division II of their brief. Seemingly fearful of a frank reliance on the settled American doctrine they revert again to the English law which, as we were at pains to point out in our opening brief (p. 12) and as the trial judge in his opinion said does not obtain in the United States.

> "The general doctrine of the English cases, although they do not seem to be wholly consistent or founded on any clear and uniform principle, appears to be that a payment of freight in advance cannot be recovered back, unless it is made to appear affirmatively that it was intended by the

parties merely as a loan. *But as we do not regard these decisions as correct in principle we must treat them as indicating a local peculiarity of English law, which is not to be extended beyond the jurisdiction in which it is shown to have been adopted.''* (Italics ours.)

Chase v. Alliance Insurance Company, 91 Mass. (IX Allen) 311 at 315.

The unquestioned American rule is that, as freight is not earned where the contract of transportation is not performed by the carrier, freight paid in advance may be recovered back upon the frustration of the voyage and non-delivery of the cargo, unless the cause thereof be some fault of the shipper or unless there be express written stipulation between the parties to the contrary. To the citations given in our opening brief (p. 12) we venture now to add the following:

6 Cyc., 494;

Mitsui v. St. Paul Fire & Marine Ins. Co., (9th Circuit) 202 Fed. 26 at 29;

The Norman Prince, 185 Fed. 169 at p. 171;

Phelps v. Williamson, 5 Sand. (N. Y.) 578;

Griggs v. Austin, 20 Mass. (3 Pick.) 19;

The Tornado, 108 U. S. 342; 27 L. Ed. 747;

Watson v. Duykinck, 3 Johns. (N. Y.) 337.

Appellees rely upon what we have just conceded to be a recognized qualification of the general rule, to wit, that the owner may be relieved of his otherwise binding obligation to return prepaid freight if there be in the charter-party or bill of lading a special agreement permitting him to retain the same.

Appellees fail to note, however, that the agreement to vary the general rule shall be, not only in writing, but shall be also in clear, explicit and unmistakable terms. Thus, in the case of

Chase v. Alliance Ins. Co., 91 Mass. (IX Allen) 311,

referred to on page 13 of appellees' brief, the court quotes with approval from the earlier case of

Benner v. Equitable Ins. Co., 88 Mass. (VI Allen) 222,

wherein Chief Justice Bigelow said at page 224:

> "The general rule of law is, that freight paid in advance is not earned, unless the voyage for which it is stipulated to be paid is fully performed, and the owner of the vessel is liable to a claim for reimbursement in favor of the shipper, if for any fault not imputable to the latter the contract of affreightment is not fulfilled. *Minturn v. Warren Ins. Co.,* 2 Allen 86, and cases cited. This rule may be varied or annulled by an express agreement in the charter-party or bill of lading, by which it is provided that money paid in advance on account of the freight shall be deemed to be absolutely due to the owner at the time of its prepayment, and not in any degree dependent on the contingency of the performance of the contemplated voyage and the entire fulfilment of the contract of carriage. *But as such a stipulation is intended to control the usual rule of law applicable to such contracts, and to substitute in its place a positive agreement of the parties, it is necessary to express it in terms so clear and unambiguous as to leave no doubt that such was the intention in framing the contract of affreightment. Otherwise the general rule of law must prevail.*" (Italics ours.)

In the case of

Brittan v. Barnaby, 21 How. 527; 16 L. Ed. 177,

the United States Supreme Court, in declining to recognize a stamp or memorandum upon a bill of lading designed to make freight payable prior to delivery, and in enforcing rigidly the general rule that freight money is not due until the cargo be actually delivered, said (L. Ed. p. 180):

> "Such a stamp cannot be considered a stipulation, according to the legal meaning of that word. All writers upon commercial law use the word stipulation to denote a particular engagement, which may be insisted upon, before it can control the general operation of law, or vary a contract. Such stipulations are not uncommon between ship owners and shippers of merchandise, in charter-parties and in bills of lading. But when done in either, they must be made in words sufficiently intelligible to indicate an agreement that the operation of the law merchant, in respect to those instruments, is not to prevail; and the stipulation must be in writing, and be signed by the parties, before it can be received as an auxiliary to explain how the contract is to be performed. A memorandum or stamp upon the back of a bill of lading is insufficient for such a purpose, though the ship owner may have made it as an intimation of his mode of doing business, or that a practice prevailed in conformity with it at the port to which the goods were to be carried and delivered to a consignee."

No showing of a custom contrary to the general rule will suffice to abrogate the latter.

Emery v. Dunbar, 1 Daly (N. Y.) 408.

> "It is a well settled rule of law that if freight is paid in advance, and in consequence of the capture or shipwreck of the vessel, or other cause beyond

> the control of the master or owners, the goods are not carried to the place of destination, the freight is not earned, and may be recovered back, unless a special agreement was made to the contrary. * * *
>
> *Where a general rule or principle of law like this has been long and well established, it cannot be controlled by proof of any usage to the contrary.''* (Italics ours.)

The "special agreement to the contrary" relied upon in modification of the general rule must, then, be a clear and unambiguous stipulation in writing. Shipping men know perfectly well the stipulation which is currently used for this purpose. It appears, for instance, in standard form in the case of

> *Portland Flouring Mills Co. v. British & F. M. Ins. Co.,* 130 Fed. 860,

at page 863 as follows:

> "The several freight and primages to be considered as earned, steamer or goods lost or not lost at any stage of the entire transit."

Another example of such a clear and unmistakable stipulation appears in the case of

> *The Queensmore,* 53 Fed. 1022,

at page 1023, as follows:

> "The freight is payable upon said cattle at the rate of eighty shillings British sterling per head on the number shipped at Baltimore, whether delivered alive or not delivered at all, and is payable in Liverpool on the arrival of the steamships."

The foregoing are stipulations of the kind required by the law as laid down by Chief Justice Bigelow in the classic case of *Benner v. Equitable Ins. Co.,* supra;

they are "so clear and unambiguous as to leave no doubt" that there is a positive agreement of the parties to vary the normally prevailing rule.

Now, what have the appellees to offer as an agreement or stipulation to set aside the rule which unquestionably otherwise governs as between the charterer and the shipowner in this case, and requires the Globe Navigation Company, having failed in delivery of the cargo, to return the prepaid freight to the charterer? Nothing clear and unambiguous! They proffer simply this: that the charter party contains the following provision:

> "A sufficient amount for ship's ordinary disbursements at the port of loading, same not exceeding one-third of the freight, to be advanced by charterers, if required by captain, on account of freight under this charter party, subject to a charge of seven per cent to cover interest, insurance and commission; advance to be endorsed on captain's copy of charter party and all bills of lading."

The foregoing provision appellees endeavor to strain into an express stipulation that the prepaid freight should be retained absolutely by the shipowner. The fact that we paid the insurance, say appellees, and that we paid interest and commission for the advance show that the insurance was to be for our benefit; in other words, that we were to retain the freight money whether the cargo should or should not be delivered. "What benefit would it be to us to have this insurance, if in case of loss, we had to return the money? If such were the case, would it not have been better for us not to have taken out any insurance and saved paying the premium?" (appellees' brief p. 10). The answer to

these questions is plain: Unless the ship owner had been willing to pay the premium to insure the advance, it would have received no advance. To put the situation in other words, the Globe Navigation Company chartered its vessel, the "Nottingham," to W. R. Grace and Co. The ship owner found that it would be a convenience to receive one-third of the freight money in advance. The charterer consented to pay the same, provided the owner would insure the advance and pay interest and a commission thereon. The premium, interest and commission were the considerations upon which the charterer was willing to pay in advance what otherwise would not be due until the ship reached Callao, Peru. To read into a plain provision of this sort a stipulation that the freight moneys should be retained, earned or unearned, is plain violence to plain language. Where is the express unambiguous agreement of the parties which the courts have prescribed as requisite to change the otherwise fixed rule of American law that prepaid freight shall be returned if the cargo be not delivered?

Appellees urge that the trial court in finding, as it did, that "there is no testimony before the court upon which to predicate a finding that the insurance was obtained for the respondent," must, by inadvertence, have overlooked the testimony of Mr. Ford (Ap. 29) to the effect that in placing this insurance W. R. Grace and Co. were acting for the ship owner. To this, it is to be said, first of all, that the insurance policy distinctly reads and runs in favor of W. R. Grace and Co. Had it been intended that the insurance should be

for the benefit of the Globe Navigation Company, it would have been perfectly possible to make the policy read accordingly. In the second place it is not surprising that the court should consider Mr. Ford's testimony incompetent, for it appears that at the time of the placing of the insurance he was on his way home from South America and had nothing to do personally with the transaction and had no personal knowledge thereof (Ap. 38, 42).

To summarize: The established American rule that freight prepaid shall be returned in the event that the cargo be not delivered can be varied only by stipulation between the parties to the contrary. Such stipulation must not only be in writing, but must be express, clear and unambiguous; no such stipulation appears in the charter-party entered into between the shipowner and charterer in this case; the effort of the owner to distort into such a stipulation the agreement of the charterer to make an advance provided the owner should pay insurance, commission and interest thereon is obviously futile; failing such express, clear and unambiguous stipulation, the freight prepaid by the charterer to the owner could have been recovered by the former upon the abandonment of the voyage; to that right of recovery, the insurer, appellant herein, succeeded, under the doctrine of subrogation, upon payment of the insurance.

To these conclusions, the trial court apparently subscribed, but declined to decree in our favor because the learned judge felt that we had brought our libel upon

the wrong theory in grounding it primarily upon the assignment to the insurer of the captain's draft.

This opinion of the trial court and the contention of appellees in Division III of their brief, that we are not entitled in this case to recover as for prepaid freight under the prayer of our libel for general relief, we firmly believe to be founded upon an unfortunate misapprehension of the spirit and intent of the admiralty pleading and practice. We now come, therefore, in the course of the regular and orderly development of the discussion, to our next point which is that

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II.

IF, AS WE BELIEVE THE PRECEDING DIVISION OF THE ARGUMENT ESTABLISHES, APPELLANT HAS A CASE FOR THE RECOVERY OF PREPAID FREIGHT, IT IS IN ADMIRALTY ENTITLED TO THAT RECOVERY UNDER THE RECORD NOW BEFORE THE COURT.

We do not propose to infringe upon the patience of the court by reviewing again the cases set out in Division III of our opening brief and by reiterating the principles laid down in those cases. Suffice it to say here, simply, that it is the undeniable rule of admiralty practice and pleading that the controlling motive and desire of admiralty courts shall be to see that justice is administered as between parties litigant, by extracting the real case from the whole record; and such courts

consistently decline to allow that a party having a clear cause of action shall be deprived of its rights through failure or omission to frame and present its case with exacting precision in the opening pleadings. This does not mean that admiralty courts will permit a libelant to present its case with gross carelessness or in bad faith and with design to take advantage of a respondent, nor even that a party framing its case mistakenly, though in good faith, shall be allowed to recover if its mistake operate to surprise the other party. Where however the pleadings and evidence adduced, though they do not precisely correspond, nevertheless present, when the record is viewed as a whole, a clear case for the libelant, and the court sees that justice requires a decree in its favor, and such decree can be given without prejudice to the respondent, the admiralty courts decline to be turned aside by suggestions of variance between pleading and proof.

In this case appellant, in entire good faith, framed its libel primarily upon the theory that it was entitled to recover the advance that was made to appellees by a suit founded upon the captain's draft. We still believe, as we contended in Division I of our opening brief, that our position in this regard was well founded, but we urge that if our proper redress were by suit for the recovery of prepaid freight we are in the present state of the record, since our libel and respondent's answer and the evidence present the whole situation clearly to the court, entitled to a favorable decree.

Our libel itself sets before the court, in Paragraph II thereof, that the money given to the captain was an advance against freight. True, the libel does not set out that paragraph of the charter-party which provides that such advance should be made. This omission, however, is duly supplied in Paragraph VII of respondent's answer. There is therefore no room for any contention upon the part of appellees that an award to us upon the prepaid-freight theory would be in anywise a surprise to them. This situation brings us clearly within the suggestion of

The Clement, 5 Fed. Cas. 1015,

that "the court will look at the allegations of both the parties", and of

The Syracuse, 12 Wall. 67; 20 L. Ed. 382,

that when the proof comes from the opposite party it cannot be deemed to have operated to surprise him.

The amazing contention of appellees in this case is that, even though the record show a case in our favor built in part by their own pleading and proof, we should be denied the decree because our initial pleading did not present completely the grounds therefor. How is such a position to be reconciled with the broad statement of

The Prudence, 204 Fed. 66,

that,

> "The court below, having the whole matter before it, was bound to decree in accordance with the facts established"?

(The cases to which we have just referred, together with others holding like doctrine, are considered more fully in our opening brief pp. 13 to 19).

We do not wish, by our emphasis on what we believe to be our undeniable right to recover as for prepaid freight, to suggest or convey the impression that we abandon our initial contention for a recovery in this case as legal owner and holder by due endorsement and assignment of the captain's draft. We therefore devote the concluding pages of this argument to rebuttal of Division I of appellees' brief and to our affirmative contention that

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III.

APPELLANT IS ENTITLED TO RECOVER UPON THE CAPTAIN'S DRAFT.

It is admitted that appellant is the legal owner and holder of the draft by due and legal endorsement and assignment. Appellees contend, however, that we are not entitled to recover thereon because the master, being at his home port, was without authority to execute the draft. We concede, as indeed we did in our opening brief, that a ship master cannot normally pledge his owners at the home port of the vessel. Appellees' excerpt from Abbott on the Law of Shipping (page 7 of their brief) very explicitly states, however, that this normally prevailing rule gives way if

there be special authorization to the captain or some usual custom of trade sanctioning a contrary practice.

The facts developed in the taking of testimony upon this cause suggest irresistibly an implied, if not an express, authorization to the master of the "Nottingham" to execute drafts of the character here in controversy. That testimony shows, also, that, at least so far as W. R. Grace and Co. and the Globe Navigation Company are concerned, the giving and taking of these drafts was a usual custom of trade. Thus, to amplify somewhat the statements of our opening brief in this connection, Mr. Ford of W. R. Grace and Co. testified (Ap. 33) that his company took a great number of drafts of this same character from the Globe Navigation Company at previous times. He further testified (Ap. 34):

> "Mr. CAMPBELL. Q. You have personal knowledge of the fact of taking other drafts of the master of his vessel?
>
> A. I have, yes.
>
> Q. You say that this is the kind of a draft that you always used?
>
> A. That is our usual form of draft. I made our first transaction with the Globe Navigation Company and established the routine by which this business was done.
>
> Q. Did you ever make advances without taking drafts?
>
> A. No, sir."

And, again later, Mr. Ford testified (Ap. 40-41):

> "Q. Now, in all the drafts that W. R. Grace & Company took from the Globe Navigation Com-

pany for advances under prior charters, they were the same character as this draft, I understand?

A. The same, yes."

Mr. Thorndyke, the manager of the Globe Navigation Company, professed complete innocence of any knowledge of these constantly used drafts, until one was shown him taken from the very files of his own office—the so-called Clise draft (Ap. 45, 61). One is tempted to suggest, with all respect, that Mr. Thorndyke must be of the school of those who hold that where ignorance is bliss, 'tis folly to be wise. Captain Swenson of the "Nottingham" corroborates Mr. Ford's testimony that these drafts were in constant use (Ap. 59-60):

"Q. Now, you have secured advances on other voyages, haven't you?

A. I have.

Q. You have signed documents for them, haven't you?

A. I have.

Q. While you were in the employ of the Globe Navigation Company?

A. While I was in the employ of the Globe Navigation Company.

Q. As master of the schooner 'William Nottingham'?

A. Yes, sir."

And Mr. Thorndyke, himself, on redirect examination by his own counsel stated that the masters of the Globe Navigation Company's vessels returned files of documents to the head office which he understood contained all the papers connected with the various shipments (Ap. 48):

"Mr. Clise. Q. Didn't the masters customarily return to you whatever papers they took or gave to Grace & Company, or copies of them?

A. They always returned a file of documents which I assumed contained all of the things, all the documents in connection with that transaction with Grace & Company's office.

Q. Either the documents, duplicates or copies, as I understand?

A. Yes, sir, copies."

The drafts were executed in triplicate, and the captains of the ships, therefore, had two copies left after delivery of the original to W. R. Grace and Co.

Mr. Thorndyke further admitted, with reference to the "Clise" and the "Nottingham" drafts that even after they came to his notice he never asked W. R. Grace and Co. for their return, thus recognizing by his inaction in that behalf their continuing validity (Ap. 63).

Appellees in their brief (pages 2 to 5) repeatedly assert or suggest that this draft was nothing more nor less than a receipt for the money advanced. If so, it was the most labored and cumbersome form of receipt ever devised. The use of an elaborate draft of this character simply for a receipt would be absurd beyond belief. The plain fact is that there were separate and ordinary receipts for this money and they are in evidence: that signed by the master as Plaintiff's Exhibit B (Ap. 55) and a duplicate receipt signed by the Globe Navigation Company, Limited, G. C. Thomas, as Libelant's Exhibit 4 (Ap. 21) and as Plaintiff's Exhibit D (Ap. 60).

We respectfully repeat the request of our opening brief, that the decree entered in the court below be reversed and that said court be directed to enter a decree for libelant (appellant here) in accordance with the prayer of the libel, and that appellant be accorded its costs and such other and further relief as may be appropriate in the premises.

Dated, San Francisco,
December 15, 1915.

Respectfully submitted,

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